

SUPREME COURT
STATE OF WISCONSIN

EMPLOYEE TRUST FUNDS BOARD,
THE DEPARTMENT OF EMPLOYEE TRUST
FUNDS AND ERIC STANCHFIELD,
Secretary of the Department of Employee Trust
Funds,

Case No. 99-3297-OA

Petitioners,

v.

GEORGE LIGHTBOURN, Secretary
of the Wisconsin Department of Administration
and JACK C. VOIGHT,
Wisconsin State Treasurer,

Respondents.

RESPONDENTS' MEMORANDUM RESPONDING TO SUPREME COURT
ORDER OF JANUARY 12, 2000

MICHAEL BEST & FRIEDRICH LLP

By: Ann Ustad Smith
State Bar No. 1003243
Raymond P. Taffora
State Bar No. 1017166
MICHAEL BEST & FRIEDRICH LLP
Suite 700
One South Pinckney Street
P.O. Box 1806
Madison, WI 53701-1806
Telephone: 608-257-3501

Attorneys for Respondents
George Lightbourn, Secretary of the
Wisconsin Department of Administration
and Jack C. Voight, State Treasurer

On January 12, 2000, this Court entered an order and requested that the Petitioners, Respondents and Proposed Intervenors file separate memoranda with the Court addressing several questions the Court put to such parties. Each of the Court's questions is addressed in turn.

1. Do Petitioners have standing to question the constitutionality of this legislation in light of *Columbia County v. Board of Trustees of the Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962) as discussed in *Silver Lake Sanitary District v. DNR*, No. 99-0620 (1999 WL 1125252) (Ct. App. Dec. 9, 1999) (petition for review filed December 20, 1999)?

A. Do Petitioners have legislative authority, fiduciary duty and/or other official duty to question constitutionality?

Petitioners in this action are (1) the Employee Trust Funds Board (the "Board"), the trustees of the Wisconsin Retirement System ("WRS") who direct and supervise the Department of Employee Trust Funds, (2) the Department of Employee Trust Funds ("ETF"), an executive branch department of the State of Wisconsin created under Wis. Stat. § 15.16, and (3) Eric O. Stanchfield, both in his official capacity as the Secretary of ETF and in his individual capacity as a participant in the WRS. (See Complaint, ¶ 5). All of the Petitioners ask this Court to declare unconstitutional certain sections of 1999 Wisconsin Act 11 ("AB 495"). As a private litigant and participant in the WRS, Mr. Stanchfield has standing to assert that constitutional challenge. Further, because this action involves a private litigant, the Board and ETF may also challenge the constitutionality of AB 495 under either of two well-recognized exceptions to the general rule that otherwise prohibits a state agency from challenging the constitutionality of a

statute. Finally, the Board as a fiduciary of the WRS Trust Fund is also in a unique position justifying standing in this case.

The general rule is that state agencies or public officers do not have standing to assert a constitutional challenge to State statutes. *Fulton Foundation v. Department of Taxation*, 13 Wis. 2d 1, 11, 108 N.W. 2d 312, 109 N.W.2d 285 (1961); *Columbia County v. Board of Trustees of the Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962). However, this no-standing rule is subject to two exceptions which permit a State agency or officer to assert a constitutional challenge. In *State ex rel. La Crosse v. Rothwell*, 25 Wis. 2d 228, 233, 130 N.W.2d 806, 131 N.W.2d 699 (1964), the Court identified these exceptions as follows:

The general rule is subject to two exceptions: (1) If it is the agency's official duty to do so, or the agency will be personally affected if it fails to do so and the statute is held invalid, and (2) if the issue is of "great public concern."

Id., citing *Associated Hospital Service v. Milwaukee*, 13 Wis. 2d 447, 109 N.W.2d 271 (1961), and *Fulton*. In addition, the *Rothwell* opinion states that according to *Columbia County*, these exceptions apply only to cases involving at least one private litigant.

In *Fulton*, this Court first recognized the "public concern" exception. In that case, the Court determined that the constitutional questions of whether public funds could be diverted to a private purpose and whether a particular tax exemption violated equal protection of the laws both qualified as issues of great public concern. Later, in *Associated Hospital*, the Court held that the issue of whether a particular tax exemption violated the uniformity clause was also of great public concern.

This case also involves issues of great public concern. Issues of legality and constitutionality of legislative modifications to the Wisconsin Retirement System and the public employee trust fund are of significant importance to the state at large. *See*, § 40.1(1), Stats. There are currently about 454,000 participants in the WRS, including 249,000 active employees, 101,000 annuitants and 104,000 inactive employees. As of the end of 1998, the State of Wisconsin and 1,193 other employers participated in the WRS. These employers include counties, cities, towns, villages, school districts, library districts and other governmental units and instrumentalities of two or more units of government created within the State of Wisconsin. §§ 40.02(28) and 40.02(54), Stats.

According to this Court in *Columbia County*, the subject of pensions for public employees is a matter of state-wide concern. *Id.* at 320. This Court confirmed that the pension system is of great public concern when it said in *State ex rel. Singer v. Boos*, 44 Wis.2d 374, 384, 385, 171 N.W.2d 307 (1969):

It is recognized that one of the most effective methods to obtain qualified personnel is to provide them with security, and one of the best ways to provide security for an employee is through an adequate pension plan. . . . [The] fostering of good, effective and qualified personnel to handle the affairs of the government, whether it be a laborer or an administrator, is a proper public concern.

Because this case involves a matter of great public concern, and because there is at least one private litigant who will be personally affected by the legislation at issue and is a Petitioner in this case, the Petitioners have standing to address the constitutional questions implicated by the petition.

The other exception to the general rule prohibiting a state agency from challenging the constitutionality of a statute is if it is the agency's official duty to do so, or the agency will be personally affected if it fails to do so and the statute is held invalid. The Board is situated somewhat differently than most government agencies because of its fiduciary duties with regard to the Trust Fund. Ch. 40 creates a public employe trust fund which must be managed, administered, invested and otherwise dealt with "solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants . . . and shall not be used for any other purpose." § 40.01(2), Stats. Each member of the Board "shall be a trustee of the fund and the fund shall be administered by the department of employe trust funds." *Id.*; *Wis. Retired Teachers Assn. v. Employee Trust Funds Board*, 195 Wis. 2d 1001, 1041 (Ct. App. 1995), aff'd, 207 Wis. 2d 1 (1997) (holding that the Secretary of ETF and the Board members "were fiduciaries and had an obligation to administer the trust for the benefit of the trust beneficiaries.")

This Court has held that while not required, it is appropriate for the Petitioners as fiduciaries to seek constitutional guidance from the court before implementing legislation affecting the Trust Fund. In *State ex rel. Morse v. Christianson*, 262 Wis. 2d 262, 266, 55 N.W.2d 20 (1952), the Board of Trustees of the Wisconsin Retirement Fund (a predecessor of the WRS) had refused to approve an application for benefits, indicating that the law was unclear regarding the Board's ability to approve an application for a retirement annuity after the applicant has died. The Court pointed out that "the defendants were trustees administering public funds and in case of doubt as to the proper interpretation of the law it was their duty to have the law construed by the courts before

making expenditures, unless clearly legal.” *Id.* In *Wis. Retired Teachers Assn. v. Employe Trust Funds Board*, 207 Wis. 2d 1, 558 N.W.2d 83 (1997), this Court supplemented the *Morse* decision, concluding that in the *Retired Teachers* case, the trustees were not required to obtain a court determination on constitutionality, and had upheld their fiduciary duties by implementing what was found to be an unconstitutional law in good-faith reliance on the opinion of constitutionality rendered by the attorney general. *Id.* at 26. No such request for an attorney general’s opinion has been made with regard to AB 495. While the Petitioners may not be required to seek court guidance, the Court’s decisions in *Morse* and *Retired Teachers* suggest that the Court recognizes the special position of the Board as a fiduciary body with special duties and obligations, among them a duty to administer the Trust Fund only in accordance with constitutional legislation.¹

Respondents believe that the Petitioners in this case may invoke both exceptions to the general no-standing rule since one of the Petitioners, Mr. Stanchfield, is a “private litigant” whose rights are affected by Act 11. (*See* Complaint, ¶ 5.) Consequently, the Petitioners may raise the constitutional issues by virtue of *Fulton*, *Columbia County* and their progeny.

¹ Further, because there is no immunity from personal liability where a public official negligently performs a ministerial duty, the ETF Board and Mr. Stanchfield may be personally liable for any breach of fiduciary obligations to the WRS. *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976). While the *Retired Teachers* Court rejected imposition of personal liability and held that the ETF Board and ETF Secretary could claim official immunity, the Court noted that the Defendants in that case implemented the legislation at issue *after* receiving an opinion of the Attorney General that the legislation was constitutional. *Retired Teachers*, 195 Wis. 2d at 1044.

1.B. If the petitioners and respondents, both government entities, are precluded from suing each other in this case, is a private, non-governmental party required as petitioner to seek either a declaration of constitutionality or unconstitutionality?

Because Petitioner Stanchfield appears in this case as both a government official and as a private litigant, no additional parties are necessary.²

1.C. What realignment of the parties, if any, is required to provide for parties that have proper standing and/or interest to challenge or defend constitutionality?

No realignment of the parties is required.

1.D. What other persons, if any, have or claim any interest that would be affected by the declaratory relief sought, as specified in § 806.04(11)?

Wis. Stat. § 806.04(11) provides, in relevant part:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration may prejudice the right of persons not parties to the proceeding.

All participants in the WRS and all participating employers are persons who have or could claim an interest in or which would be affected by the declaratory relief sought in this case. However, the interests of the participants in the WRS are represented by the Board, which is a fiduciary of the Trust Fund and must act in the best interests of the participants.

² On Friday, January 28, 2000, the Wisconsin Professional Police Association, Inc., the State Engineering Association and some of their members filed Motions to Intervene. The proposed WPPA and SEA intervenors challenge the legality and constitutionality of AB 495 (indeed, the WPPA Petition is nearly identical to that filed by existing Petitioners). The Court's disposition of the WPPA and SEA motions may well have an impact on its decision on the issues briefed herein.

2. By what authority have petitioners and respondents retained private counsel and has the attorney general received notice that the constitutionality of legislation is being questioned as required by § 806.04(11)?

Both Petitioners and Respondents retained private counsel in accordance with the provisions of Wis. Stat. § 14.11(2). That statute provides, in relevant part:

EMPLOYMENT OF SPECIAL COUNSEL. (a) The Governor, if in the Governor's opinion the public interest requires such action, may employ special counsel in the following cases:

1. To assist the attorney general in any action or proceeding;
2. To act instead of the attorney general in any action or proceeding, if the attorney general is in any way interested adversely to the state;
3. To defend any action instituted by the attorney general against any officer of the state;
4. To institute and prosecute an action or proceeding which the attorney general, by reason of the attorney general's opinion as to the validity of any law, or for any other reason, deems it the duty of the attorney general to defend rather than prosecute.

On October 6, 1999, the ETF requested the appointment of special counsel pursuant to § 14.11(2). (*See Smith Aff., Exh. A*). On October 13, 1999, the Attorney General, through the Assistant Attorney General and Administrator of the Legal Services Division of the Department of Justice, informed the Governor's Legal Counsel that appointment of special counsel was appropriate, given that the staff in the Department of Justice had a direct financial interest in the validity of AB 495 (*See Smith Aff., Exh. B*). Similarly, on November 15, 1999, the Legal Counsel for the Department of

Administration requested employment of special counsel under § 14.11(2). (*See* Smith Aff., Exh. C). Again, the Attorney General, through the Assistant Attorney General and Administrator of the Division of Legal Services in the Department of Justice, wrote to the Governor's Legal Counsel that "appointment of special counsel is warranted under the very unique circumstances presented by this case." (*See* Smith Aff., Exh. D). Consequently, both Petitioners and Respondents have utilized the availability of special counsel under § 14.11(2), and each of the parties' requests for special counsel received the concurrence of a representative of the Attorney General's Office.

The requirement that the Attorney General receive notice of a challenge to the constitutionality of legislation in § 806.04(11), Stats., was met by Petitioners' service of the petition and related documents on him shortly after the original Petition was filed.

Respectfully submitted this ____ day of January, 2000.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Respondents George
Lightbourn and Jack C. Voight

By: _____
Ann Ustad Smith
State Bar No. 1003243
Raymond P. Taffora
State Bar No. 1017166
MICHAEL BEST & FRIEDRICH LLP
Suite 700
One South Pinckney Street
P.O. Box 1806
Madison, WI 53701-1806
Telephone: 608-257-3501